SUPREME COURT. U. S.

No. 150

IN THE

SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICKOLAS MANNINO *et al.*,
Respondents.

PETITION FOR REHEARING.

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Comes now Petitioner, William A. Wegmann, through Counsel of Record, pursuant to Rule 33 (2) of the Court and respectfully moves the Court to reconsider and grant re-hearing upon its Order denying certiorari in the above cause for the following grounds and reasons:

I.

The Supreme Court of Florida subsequent to the initial proceedings of this cause rendered a decision having vital effect upon this cause which ought to be justly considered by this Honorable Court before its final determination.

II.

That the case above referred to positively and with clarity indicates the error of the lower courts and supports the position of the Petitioner seeking review.

STATEMENT OF POINTS AND ARGUMENT.

Petitioner in the case at bar had entered into a contract in the State of New Jersey for services in development of Florida land. The Court below in construing the contract erroneously found that this contract required Petitioner to perform the services of a "real estate broker" which could be done only by licensed brokers and, notwithstanding proof of a *prima facie* case of breach of contract by Defendants, the Court has declared Petitioner not entitled to recovery. The contract involved consisted of three separate writings which were attached to Plaintiff-Petitioner's original Complaint as Exhibits "A", "B" and "C".

Exhibit "A" was the initial writing of the Plaintiff and Defendant (Respondent). Exhibit "B" was a subsequent written modification as was Exhibit "C". These documents completely revised the original contract writing.

The Lower Court over protest of Petitioner refused to construe Exhibits "B" and "C" as a part of the contract documents.

The Circuit Court of Appeals clearly shows this error in its opinion (A-3) when it stated:

> "Appellant does not cite a single Florida case to aid us in determining whether his contract is a contract which requires him to perform the acts of a real estate broker. *We must therefore look to the exact*

terms of the agreement and compare them with the language of the statute."

The opinion then proceeded to copy the duties of Appellant as set forth in Exhibit *"A" only. Absolutely* no consideration was accorded to the terms of Exhibit "B" or "C" which under time honored decisions of our State Court formed an integral part of the true contract.

It must be borne in mind that to sustain the Lower Court, the following question must be answered in the affirmative:

Does the contract *construed as a whole require* Petitioner to perform services as a real estate broker? Exhibit "B" provided:

> In accordance with our mutual understanding, you are the owner of A. B. C. Excavating Company, who holds title to a plot of ground in Dunedin, Florida, known as Harbor View Villas.
>
> Title to the aforementioned property is being transferred from A. B. C. Excavating Company, to you personally and thence from you, personally, to a New Jersey corporation known as Harbor View Villas, Inc.
>
> *This corporation, after doing certain improvements, etc., to said land is to sell the land in the form of lots to private individuals* and in accordance with a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property.
>
> Now this is to certify that our mutual understanding is that I am to wait for my percentage of the profit until such time as the aforementioned Harbor View Villas is sold to individual buyers.

> It is further mutually agreed upon by you and I that the original percentage of commission or remuneration to be received by me shall be based upon the original cost of the ground of $175,000.00, plus the cost of engineering, dredging, grading, excavating, street surfacing or paving and, conveyancing. When these costs are all accumulated into one total, that total is to be deducted from the accumulated sales of the aforesaid Harbor View Villas and, the difference between those two figures is the figure to be used in computing the percentage which is to be paid me for my services rendered, all of which, we, the undersigned agree and certify.
>
> (Signed) William A. Wegmann,
>
> (Signed) Nicholas Mannino.
>
> /s/ Leonard A. Spector.

As seen from the language of the Circuit Court opinion no dignity was accorded the true modified contract. Petitioner's brief cited the best authority previously available for the contention that a contract must be construed as a whole. Since the initial proceedings, an even stronger decision has now taken its place in the law of Florida in *Montgomery Roofing Company* v. *Howland*, 98 So. 2d 484. In this case the Supreme Court of Florida was squarely faced with a contract application far weaker than the case at bar, the facts being as follows:

> Contract was made for construction of a water treatment plant in Miami, Florida. Contractor made a sub-contract with Plaintiff to supply labor and material for ventilation equipment under a specific section of the general contract.
>
> The officer of the general contractor who made first sub-contract later made a second sub-contract with a third party dealing with portions of the ventilating equipment. First sub-contractor performed work alleged to be in first sub-contract and general contractor

asserted a right to deduction claiming work of second contract was embodied in duty of the first.

Florida Court held in its opinion 98 So. 2d 484, 486:

> "Here, the Plaintiff's sub-contract was, on its face, unambiguous; yet almost simultaneously with its execution, the same official executed on behalf of the defendant another contract of the same dignity, covering a portion of the exact work called for by the Plaintiff's contract. *Both contracts were part and parcel of the same general transaction, that is, the defendant's general contract job. While the situation does not fall strictly within the rule that where an agreement is evidenced by two or more writings, the writings must be construed together, it has been said that 'this rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days but concerning the same subject matter may under some circumstances be regarded as one contract and interpreted together.'* " 7 Fla. Jur., Contracts, Sec. 78, p. 144 (Italics supplied).

The section of *Florida Jurisprudence* cited provides:

> "Sec. 78—Construing Writings Together.
>
> When an agreement is evidenced by two or more writings, the writings must be construed together. This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together. Where a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other. But where a variety of instruments form one transaction, the law will not give effect to any one instrument unless the whole transaction is completed."

In the cited case it is readily apparent that the Florida rule regarding contracts contained in several instruments must be construed together. Before closing the doors of justice on this petitioner the Court here should again consider Page Five (5) of Petitioner's Petition for Certiorari especially *Pensacola Gas Company* v. *Lotze*, 2 So. 609, holding:

> "One part of an agreement may be resorted to to explain the meaning of language or expressions of another part."

CONCLUSION.

The Court below has done violence to a cardinal rule of contract construction which patently shows to be an oversight.

The lower Court in reaching its decision positively showed that it considered the entire agreement to be vested only in Exhibit "A". If the Court below had considered Exhibit "B" it would have found that the parties modified the contract to provide for the formation of a corporation which was to sell the land viz.:

> "This corporation, after doing certain improvements etc., to said land is to sell the land in the form of lots * * * etc." (Exhibit "B" A-17, Petition for Certiorari.)

Upon consideration of Exhibit "B" the Court below then must find that Petitioner herein as President of the corporation which the parties contracted to form and did form was exempt from brokerage requirement under the express terms of the Florida Statute providing:

> "475.01 (2) * * * nor shall said terms be applied to one officer of every corporation engaged in the sale

of its own properties who shall be its president unless otherwise provided in its charter or by-laws, if said corporation shall not otherwise be classed as a real estate broker or a salesman."

The corporation which was formed squarely meets the exemption; the Petitioner and Respondents carefully followed the law of Florida in its formation. Substantial justice can only be done now by this Court in ordering a new trial and granting this Petition.

Respectfully submitted,

HOWARD P. RIVES,
First Federal Building,
Clearwater, Florida,
As Attorney for Petitioner.

CERTIFICATE.

As counsel of record for the Petitioner I certify that this petition is presented in good faith and not for delay and that it is restricted to stating grounds which are confined to intervening circumstances of substantial grounds not previously presented.

HOWARD P. RIVES,
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Clearwater, Florida,
Attorney for Petitioner.